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LEGISLATIVE AMENDMENT OF CORPORATION STATUTES — THE WISCONSIN PROBLEM

KENNETH K. LUCE

Observations have been made upon frequent occasion in the recent past, in articles in legal publications¹ and at meetings of the various Bar Associations,² that the Wisconsin statutes concerning corporations are in need of extensive overhaul and revision. It has been suggested with some reason that Wisconsin follow Minnesota, Ohio, Illinois³ and other states in the enactment of an integral and comprehensive act, and thus terminate the endless process of patchwork amendment.⁴ The feeling has been that only in this fashion may the state obtain a body of corporation statutes which will allow corporations organized under Wisconsin law to achieve the organizational flexibility necessary to modern business and financial method. Business men have evidenced reluctance to incorporate in Wisconsin.⁵ Some of this may be attributed to the relatively high incorporation fees, but probably more is due to advantages and flexibility to be gained from incorporation elsewhere. No doubt many business promoters consider these factors seriously when qualifying their ventures to meet the problems and competition involved in present-day business enterprise.

The difficulty in Wisconsin lies not in undue restriction inherent in present corporation statutes, or in lack of foundation in sound principle, but rather in an absence of completeness sufficient adequately to inform corporate management of its powers and responsibilities. Many important matters are omitted entirely in the statutes; and others are so ambiguously stated that the attorney hesitates to advise his corporate client with regard to action considered proper and neces-

¹ Garrison, "Proposed Redraft of the Wisconsin Corporation Laws," 12 Wis. L. Rev. 417 (1937); Levin, "Blind Spots in the present Wisconsin General Corporation Statutes," 1939 Wis. L. Rev. 173.

² 28 Reports of State Bar Association of Wisconsin 22 (1938), address by Dean Lloyd K. Garrison.

³ The Ohio General Corporation Act became effective June 9, 1927. See Wright, "The New Ohio General Corporation Act," 75 U. of Pa. L. Rev. 753 (1927). The Illinois Business Corporation Act was adopted in 1933; Illinois Rev. Stat. (State Bar Asso. ed. 1945), Ch. 32.

⁴ Solether and Jennings, "The Minnesota Business Corporation Act," 12 Wis. L. Rev. 419 (1937); Sterling, "Modernizing California's Corporation Laws," 12 Wis. L. Rev. 453 (1937); Katz, "The Illinois Business Corporation Act," 12 Wis. L. Rev. 473 (1937); Davies, "Reflections of the Amateur Draftsmen of the Ohio General Corporation Act," 12 Wis. L. Rev. 487 (1937). The last general revision of Wisconsin corporation statutes was in 1927. Laws of Wis. (1927), Ch. 534. However this appears to have been a patchwork revision in which the main body of the pre-existing law was retained intact.

⁵ Shiels, "Why do Wisconsin Concerns Incorporate in other States?" 11 Wis. L. Rev. 457 (1936).

sary by business judgment, for fear of lack of statutory authority. For instance, there are no provisions concerning merger, consolidation, or cumulative voting; and general ambiguity in the voting provisions sometimes makes it difficult to conclude a voting trust is authorized, or that voting may be had on a particular question by classes.⁶ Also there are no provisions for controlling dissenting stockholders through appraisal and payment for their shares.

The 1945 Session of the Legislature produced several commendable amendments to the corporation statutes,⁷ but it has been observed that the amendments were merely a further extension of the patchwork process.⁸ Action by the Legislature to enact a general corporation act which will amount to a comprehensive revision of the entire structure is to be anticipated for some future time. This article has been prepared with this in mind, and for the purpose of indicating such constitutional limitations as there may be upon the power of majority⁹ stockholders to avail themselves of the benefit of the provisions of any such general revision against the dissent of minority stockholders.¹⁰ The article concerns the power of majority stockholders

⁶ See *Stoelting Brothers Co. v. Stoelting*, 246 Wis. 109, 16 N. W. 2d. 367 (1944); *Goetzinger v. Donahue*, 138 Wis. 103, 119 N. W. 823 (1909); *Brey v. Jones*, 190 Wis. 578, 209 N. W. 675 (1926); Wis. Stat. (1943), sec. 182.15, for authority concerning voting trusts. Wis. Stat. (1943), sec. 182.15, as amended by Ch. 538, sec. 1., Laws of Wis. (1945), governing voting in general makes no reference to voting by classes, nor does Wis. Stat. (1943) sec. 180.07, governing majority amending power. See also Wis. Stat. (1943), sec. 180.11 (2). Amendments require "a vote of two-thirds of all the stock outstanding, and entitled to vote, * * * unless a greater vote * * * be required in its articles;" while Sec. 182.15 states "every stockholder * * * shall be entitled to one vote for each share of stock held and owned by him at every meeting," unless "a provision to the contrary is inserted in the articles." Many questions are left unanswered by these provisions. Presumably each shareholder is entitled to one vote for each share on each question raised and each director elected at a meeting. This is the usual corporate practice, but the section fails to say even this, but rather might be construed to mean one vote per share per entire meeting. In the face of such initial ambiguity, there naturally is question as to how far one may go in inserting in the articles provisions "to the contrary," regarding such matters as cumulative voting, voting by classes on certain questions, etc. These matters will be more fully discussed later in this article. Voting by classes has been expressly authorized on a few questions, namely changes in relation to preferred stock; Wis. Stat. (1943), sec. 182.13 (3), as amended by Ch. 467, Laws of Wis. (1945); and changes in capital applicable to no-par shares by amendment to Wis. Stat. (1943), sec. 182.14 in Laws of Wis. (1945), Ch. 350, sec. 1.

⁷ Laws of Wis. (1945), Chapters 350, 372, 462, 465, 467, 539, 572, 538, and 573. Statutory consolidation and merger for nonstock corporations was added by Chapter 48.

⁸ Clemons, "1945 Amendments to Business Corporation Statutes," 6 Milw. Bar Asso. Gavel, No. 3, p. 7 (1945).

⁹ Wherever used in this article, the word "majority" shall refer to the per cent of stockholders, as a whole or by classes, required by the corporation statutes to take the corporate action in question in the particular context. For instance, Wis. Stat. (1943), sec. 180.07 requires a "vote of two-thirds of all the stock outstanding, and entitled to vote," for amendments to the articles of a business corporation, "unless a greater vote shall be required in its articles."

¹⁰ This problem was considered with respect to the Ohio General Corporation Act in Dodd, "Amendment of Corporate Articles under the new Ohio General Cor-

to take corporate action under authority conferred upon them by new statutes. Previous to these new statutes such corporate action may have been *ultra vires*, beyond all corporate authority, or it may have been within corporate authority through unanimous stockholder action, but still beyond majority power. Whether it was one or the other is not material to the problem here discussed. If proposed action is *ultra vires*, in excess of any authority conferred upon the corporation by the state, it is obviously in excess of majority power. But when *intra vires*, the proposed action still may be beyond majority power against the legally asserted challenge of a dissenting stockholder, particularly when the latter acquired his shares before the statute was passed purporting for the first time to confer the power in question upon the majority. Therefore, the inquiry must be as to when unanimous stockholder action may be required for valid exercise of power admittedly within corporate authority at the time of the exercise, and the problems of *ultra vires* are clearly collateral.

MAJORITY COMMON LAW AND CHARTER POWER FOR CORPORATE ACTION

Clearly the problem of constitutional limitation upon the power of majority stockholders to act under newly enacted corporation statutes is only a part of the general field of corporate action, and discussion of the problem without relation to its location in the general field only can lead into confusion. Majority power can be defined only with relation to the status of the minority stockholders who legally oppose it. Before discussing legislative power, through increase of majority power, to change the contract of the minority stockholder without his consent, it is necessary to fix the time as to which that contract is to be determined. The issue of change cannot arise except with reference to statutes becoming effective after such point in time.

When corporate stock is issued, whether at the time of original organization or later in the corporate history, its purchasers become parties to the contract of stockholders *inter se*, entered into under statutory regulation, subject to the rules of statutory interpretation, and governing the corporate business organization.¹¹ The terms of of

poration Act," 4 U. of Cinn. L. Rev. 129 (1930). Professor Dodd concluded that, with certain possible exceptions, the Ohio act would pass constitutional tests. However, since constitutionality turns upon the scope given in each state to legislative power to amend corporate charters, as well as upon the completeness in each state of prior corporation legislation, the problem is individual to each state.

¹¹ 7 Fletcher, *Cyclopedia Corporations*, Rev. ed. (1931), secs. 3634, 3635; the provisions of the articles must conform to statutory requirements, and will not be construed as in conflict with them where a conforming interpretation is reasonable. *Welch v. Land Development Co.*, 246 Wis. 124, 16 N. W. 2nd. 402 (1944).

this contract are to be found in the articles of incorporation, and in the statutory and constitutional law relating to corporations as applied and interpreted in the particular jurisdiction. Because a part of this contract, particularly the statutory part, is subject to flux and change, it becomes necessary in particular cases, with reference to the contracts of particular stockholders before the court, to place the time in corporate history which should govern their definition. Some courts have recoiled from the task of re-definition in the case of each stockholder on the basis of the time he acquired his stock, and have referred the contract rights of all back to the date of original corporate organization.¹² Such an approach appears neither necessary nor proper. It is submitted that recipients of any issue of stock, whether at the time of incorporation or later, enter the corporate contract as parties as of the time of the stock issue; and it appears that the rights of their later transferees are governed as of the time of their stock acquisitions.¹³ The problem is illustrated in the facts of *Johnson v. Bradley Knitting Company*.¹⁴ In this case the corporation was originally organized in 1903. At this time a unanimous vote of shareholders was required for any amendment of the articles with reference to preferred stock.¹⁵ In 1913 the Legislature amended the statutes to require a three-fourths vote for such action.¹⁶ Plaintiff sued in 1936 to restrain amendments to the articles designed to affect materially preferred stock rights which he acquired between 1920 and 1931, and which were issued in a company capital structure reorganization in 1919. The decision did not question the power of three-fourths of the shareholders to make amendments, and assumed the applicability to plaintiff's case of the 1913 statute.¹⁷ The contest involved solely interpretation of statutes assumed by all parties to be a part of plaintiff's contract. These were not the statutes in effect at the time the corporation was organized in 1903. Actually the statutes governing amendments to preferred stock which were assumed and quoted in the decision as a part of plaintiff's contract

¹² *Allen v. Francisco Sugar Co.*, 92 N. J. Eq. 431, 112 A. 887 (1921).

¹³ See *Milwaukee Sanitarium v. Swift*, 238 Wis. 628, 300 N. W. 760 (1941), where the court stated at p. 636: "a person acquiring corporate stock consents in advance (p. 577) to the making of such change in the articles, as the statutes in effect at the time of such acquisition permit; * * *." Thus, where statutes enlarging majority corporate power have been passed in the interim, the transferee of corporate stock acquires different contract rights in the corporation than his transferor had. To the same effect: *Kreicker v. Naylor Pipe Co.*, 374 Ill. 364, 29 N. E. 2d. 502 (1940).

¹⁴ 228 Wis. 566, 280 N. W. 688 (1938).

¹⁵ Wis. Stat. (1911), sec. 1759a.

¹⁶ Laws of Wis. (1913) Ch. 533.

¹⁷ *Johnson v. Bradley Knitting Co.*, 228 Wis. 566 at 574, 280 N. W. 688 (1938), where, after quoting Wis. Stat., Secs. 180.07 (1), and 182.13, the court stated: "These statutes are as effectively a part of the plaintiff's certificates of stock and of the corporate charter as though printed therein."

were the statutes in effect at the time of suit, and which had been last amended in 1927.¹⁸ Since these statutes were different than those of 1919, it cannot be said the court selected the time the stock was originally issued as determining plaintiff's contract rights. He purchased preferred stock both before and after 1927, so it cannot be said his contract rights were determined strictly as of the time of his stock acquisitions. To read into plaintiff's contract without his consent statutes enacted after he acquired his stock is to raise the constitutional issue later to be discussed. It was done in this case at least as to a part of plaintiff's stock, but that it can be done over objection and where rights of plaintiff are materially affected thereby is not the decision of the case.¹⁹ The amendments made to Section 182.13 of 1925 and 1927, and of 1927 to Section 180.07(1) were apparently not such as to affect the rights of plaintiff here, and the case was argued and decided on the theory that the statute as amended in 1927 governed the case and was a part of plaintiff's contract.²⁰

Assuming the contract of the dissenting stockholder is to be determined as of the time of his stock acquisition, what is the amending power of the majority with reference to it? The inquiry leads to the articles of incorporation and corporate legislation in effect at that time.

Analogy to partnership law might dictate that unanimous consent of all is required for any change in the contract of any member.²¹ However this was hardly true of corporations even before it was common practice to include in the statutes provisions expressly reserving amending power to the majority. In the absence of such provisions the courts implied from the stockholders' contract a so called "common law" majority power to amend in good faith and for purposes reasonably calculated to meet genuine business de-

¹⁸ Wis. Stat. (1943), secs. 180.07 (1) and 182.13. Sec. 180.07 (1) was amended by Laws of Wis. (1927), Ch. 534, sec. 7; and sec. 182.13 was amended by Laws of Wis. (1925), Ch. 324, and Laws of Wis. (1927), Ch. 534, Sec. 52.

¹⁹ The language of the opinion proceeds on the theory of determination as of the time plaintiff acquired his stock. At page 575 the court said: "In the instant case, at the time plaintiff purchased his stock from the defendant company, the right to amend the articles of incorporation was reserved both by the articles of organization and the statutes above quoted, a method of amendment being provided by both."

²⁰ Appellant's brief in the Supreme Court, January Term (1938), No. 103, at pp. 22-24, quotes and discusses Sections 180.07 (1) and 182.13, Wis. Stat., as they stood after the 1927 amendments. The statutes as they were written prior to that time do not appear in the briefs. Had it been true that reference to the statutes in effect between 1920 and 1927 would have narrowed the majority amending power and bettered plaintiff's position before the court, it certainly may be assumed plaintiff's attorneys would have pressed the point.

²¹ Today differences "arising as to ordinary matters connected with the partnership business" have been made subject to the rule of majority control by statute in many states. See Uniform Partnership Act, sec. 18 (h); Wis. Stat., (1943), sec. 123.15 (8).

velopmental need. Such power is illogical and inconsistent with partnership and contract law, but multiplicity of parties and other differences between the contract of corporate business organization and the partnership and other contracts seem more than sufficient to have justified the fiction. It was usually expressed negatively as denying majority power to make "fundamental or radical changes in the purposes of the corporation", and the limits of the power were ascertained in each case by striking a balance between business necessity and equitable treatment of the stockholder.²² Cases defining the power usually arose in connection with major changes in business policy; for instance the sale or mortgage of all corporate assets,²³ or change and extension of railroad routes.²⁴ The courts applied the doctrine conservatively, and its growth has come practically to a halt due to universal enactment of statutes expressly reserving and defining majority amending power. This common law power no doubt still will be recognized, even independently of the statutory power, where the precise "common law" precedents are produced to support it.²⁵

For the purpose of this article suffice it to say that under the doctrine, changes amounting to consolidation or merger were generally held invalid as fundamental changes.²⁶ In such cases consolidation

²² *Martin Orchard Co. v. Fruit Growers C. Co.*, 203 Wis. 97, 233 N. W. 603 (1930), involving majority power to mortgage all the corporate assets and assume a large debt. The Court stated at p. 103, "This appeal resolves itself into a question of the proper application of these principles to the facts of the case. Did the operations objected to constitute a fundamental and radical change in the corporate activities?" See 1 Morawetz, *Private Corporations*, 2d. ed. (1886), secs. 395, 402, 403; a few cases rejected the doctrine and required unanimous stockholder consent for any change, *Zabriskie v. Hackensack*, etc. R. R., 18 N. J. Eq. 178 (1867).

²³ *Supra*, note 22. 6 *Fletcher*, *Cyclopedia Corporations*, perm. ed., sec. 2946, 2947 (1931); 13 *ibid.*, sec. 5798; 15 *ibid.*, sec. 7216; *Hill v. Page and Hill Co.*, 198 Minn. 30, 268 N. W. 705 (1936), noted in 35 *Mich. L. Rev.* 626 (1937).

²⁴ *Snook v. Georgia Imp. Co.*, 83 Ga. 61, 9 S. E. 1104 (1889); *Banet v. Alton and Sangamon R. R.*, 13 Ill. 504 (1851); *Milford and Chillicothe Turnpike Co. v. Brush*, 10 Ohio 111 (1840); *Lynch v. Eastern, LaFayette and Mississippi Ry. Co.*, 57 Wis. 430 (1883).

²⁵ *Martin Orchard Co. v. Fruit Growers C. Co.*, 203 Wis. 97, 233 N. W. 603 (1930), where the Court stated at p. 102: "The common law governing this controversy is not seriously in dispute. It is clear that a fundamental or radical change in the purposes of a corporation cannot be accomplished by amendment over the dissent of a single stockholder. * * * It is equally clear that non-fundamental or immaterial changes may be made by the ordinary procedure of amendment. * * * The defendants contend that sec. 180.07 (1), Stats., has changed this rule. This section provides: * * * Since the application of the common-law rule above stated to the facts of this case compels a conclusion favorable to the defendants, we have not found it necessary to pass upon, and do not pass upon, the effect of this section."

²⁶ 1 Morawetz, *Private Corporations*, 2d. ed. (1886), sec. 396. *McCray v. Junction R. R.*, 9 Ind. 358 (1857); *Shelbyville & R. Turnpike Co. v. Barnes*, 42 Ind. 498 (1873); *New Orleans J. & G. N. R. R. v. Harris*, 27 Miss. 517 (1854); *Lauman v. Lebanon Valley R. R.*, 30 Pa. 42 (1858); *Noesen v. Town of Port Washington*, 37 Wis. 168 (1875).

was urged as non-fundamental in character, and thus within the fictional contemplation of the stockholder, even though not authorized by statutes in effect when he acquired his stock. It must be understood that such organic changes as consolidation are not within corporate authority at all, are *ultra vires*, unless made pursuant to express statutory authority.²⁷ Had such changes been construed as non-fundamental, this doctrine would have subjected the stockholder to majority power to consolidate pursuant to statutes subsequently enacted on the theory that he consented to it in his original contract. Thus the constitutional objection against retroactive legislation changing his contract could have been neatly shelved. However the general rule of decision was that such changes were fundamental and amounted to a change in the original contract.

Dictum in one early case made the question a doubtful one in Wisconsin;²⁸ but decisions in later cases quite clearly deny the common law power of non-fundamental change as sufficiently broad to include such things as consolidation, merger, and reorganization in general.²⁹ The Court referred to this question in *State ex rel. Cleary v. Hopkins Street B. & L. Association*,³⁰ which involved several cases arising from an action by the State Banking Commission to restrain and nullify action by defendant, a Wisconsin building and loan association, to become a Federal Savings and Loan Association under a federal act permitting a state association to do so upon a vote of fifty-one per cent of its stockholders. The federal act referred to the process as "conversion"; but it is submitted more orthodox terminology would label it merger, consolidation, or just reorganization, depending upon the resulting legal effect. The state statutes governing defendant's corporate existence and organization had at no time relevant to the controversy made provision for such conversion, merger or consolidation with a corporation of a foreign jurisdiction; and the court

²⁷ 15 Fletcher, *Cyclopedia Corporations*, perm. ed. (1931), sec. 7048.

²⁸ *Kenosha, Rockford and Rock Island Rd. Co. v. Marsh*, 17 Wis. 13 (1863), where the Court stated, "The Supreme Court of Indiana has recently held that the mere consolidation with another company under an act of the legislature releases nonassenting subscribers. * * * I should not wish to adopt that conclusion without further examination." The Court in this case was thinking primarily of changes in railroad routes, and it is clear from its discussion it did not consider the effect of "mere" consolidation, where a subscriber to stock in the X-Corporation comes out with stock in the Y-Corporation. It is certainly difficult to justify his "assent" to such a result solely on the basis of the implied common law majority amending power.

²⁹ *Noesen v. Town of Port Washington*, 37 Wis. 168 (1875), holding a dissenting stock subscriber cannot be held to have contemplated consolidation upon acquiring his interest, where there were no state statutes at the time authorizing it. See also *Huber v. Martin*, 127 Wis. 412, 105 N. W. 1031, 1135 (1906); 132 Wis. 86, 111 N. W. 1107 (1907).

³⁰ 217 Wis. 179, 257 N. W. 684 (1935), aff'd. 296 U. S. 315, 80 L. ed. 251, 56 S. Ct. 235 (1935); see also *First Federal Savings & Loan Ass'n v. Loomis*, 97 F. 2d. 831 (C. C. A. 7, 1938).

held such action *ultra vires*, beyond all corporate authority, majority or unanimous. It is implicit in the decision that any objecting stockholder could have enjoined the action had the Banking Commission not stepped in. The court said:³¹

"Their charters do not authorize them to divest themselves of the corporate charter conferred upon them by the laws of the state. They have only the powers emanating from the state. These powers must be used as prescribed by the state and with due consideration for the contractual rights between the stockholders and the corporation existing by reason of state law and the charter of the corporation. Under the declared law of the state, we are bound to hold that a corporation organized under our general incorporation laws has not the power to divest itself of the corporate character derived from this sovereign state by accepting a charter from any other sovereign government."

The Court further stated such action to be beyond the "common law" power to effect non-fundamental changes:³²

"A fundamental and radical change in the purpose of a corporation cannot be accomplished by an act of the corporation over the dissent of a single stockholder.*** And there is a fundamental and material difference between being a member of a building and loan association over which the representatives chosen by the people of this state have the reserve power of control and being a member of one created by the legislative body of a different sovereign power."

By implication, even if there had been a state statute granting corporate authority to act under the federal act, such authority could not have been exercised against the dissent of stockholders who acquired their stock before such state statute became effective. Under the common law doctrine they acquired their stock solely subject to majority power to effect non-fundamental changes.

Most modern corporation statutory systems contain sections expressly conferring upon majority stockholders powers of amendment.³³ The scope of such statutory power basically is a matter of interpretation, and because the amending sections vary from state to state the scope of the power is a problem peculiar to each jurisdiction.³⁴

³¹ Ibid. p. 185.

³² Ibid. p. 190.

³³ 7 Fletcher, *Cyclopedia Corporations*, Rev. ed. (1931), sec. 3717.

³⁴ Ibid. sec. 3718: "The extent of the power to amend thus conferred upon the corporation, its officers or members depends upon the terms of the statute, and it can only be exercised within the limitations and subject to the conditions thereby imposed. Usually an amendment may be adopted if it contains provisions which might have been inserted in the original charter, ***" The Court in *Johnson v. Bradley Knitting Co.*, 228 Wis. 566, 280 N. W. 688 (1938), stated at p. 580: "Counsel have cited many cases relating to corporate amendments under general common-law rules; also cases where the amendments were

Stock is received subject to the corporate contract, and inclusion therein of a general amending power interpreted so broadly as to permit the majority to do anything within its desire is not inconceivable. The ultimate would be interpretation authorizing majority action under any legislative action of the indefinite future. Such interpretation would define the stockholder's contract as of the time of suit, and would eliminate all constitutional questions, except, possibly, due process. It would award the majority the utmost in corporate flexibility and freedom of action, but would place the minority stockholder at the complete mercy of the majority and whim of the legislature. An interpretation so destructive of the security of stock investment and the private interest of the minority stockholder is not to be expected or desired. It has not been the interpretation of the past.³⁵ Past interpretation has presented an equitable balance between the interest of the majority in regulation of the business organization in harmony with competitive business need and minority interest in majority good faith and reasonable conduct, and in maintaining the security and integrity of its investment. The majority interest is further weighted by the public interest in efficient and workable corporate organization. The inquiry concerns the meaning of a contract controlled by statute. The language of decision is that of interpretation to a considerable extent of legislative words, with an eye to determine the impression reasonably to be conveyed by them to the mind of an investor. Will the scrutiny of equity determine he agreed to such action affecting his interest as has been exercised by the majority?³⁶

made under statutory provisions. In the latter class, the decisions are based upon statutory construction and are not particularly helpful because of the difference in the statutory law of the different jurisdictions."

³⁵ See Lattin, "Equitable Limitations on Statutory or Charter Powers given to Majority Stockholders," 30 Mich. L. Rev. 645 (1932); *American Seating Co. v. Bullard*, (C.C.A. 6th, 1923) 290 F. 896; *Koehler v. St. Mary's Brewing Co.*, 228 Pa. 648, 66 A. 1016 (1910).

³⁶ *Sellers v. Joseph Bancroft & Sons Co.*, 23 Del. Ch. 13, 2 A. 2d. 108 (1938); *Traer v. Lucas Prospecting Co.*, 124 Ia. 107, 99 N. W. 290 (1904); *United Order of Foresters v. Miller*, 178 Wis. 299, 190 N. W. 197 (1922); *Wisconsin T.M.R. Co. v. Calumet C. M. Ins. Co.*, 224 Wis. 109, 271 N. W. 51 (1937); *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 149 N. W. 754 (1915); in *Milwaukee Sanitorium v. Swift*, 238 Wis. 628, 300 N. W. 760 (1941), plaintiff complained of majority action which did not recognize her claimed pre-emptive right to shares. The Court stated at p. 636: "We think it clear that in a business such as respondent's, with its success so dependent upon the character, ability, and reputation of the personnel of its staff, it may be just as necessary, and under certain circumstances even more necessary, in the interest of its stockholders, to issue stock in order to procure services."

"However, the question under consideration is no longer an open one in Wisconsin. The right of the stockholders in good faith to so amend its articles is definitely settled by the holding of this court in *Johnson v. Bradley Knitting Co.*, *supra*. It is there held that a corporation may amend its articles in any

The Wisconsin section conferring majority amending power reads as follows:³⁷

"Any corporation organized for any of the purposes authorized by this chapter, may, by a vote of two-thirds of all the stock outstanding, and entitled to vote,^{***} unless a greater vote shall be required in its articles, amend its articles so as to modify or enlarge its business or purposes, change its name or location, increase or diminish its capital stock, change its officers or its directors, or provide anything which might have been originally provided in such articles, but no corporation without stock shall change substantially the original purposes of its organization."

In *Johnson v. Bradley Knitting Company* and other recent cases, the Wisconsin Supreme Court has indicated a disposition to give this section, limited and controlled by Section 182.13 as to preferred stock, a broad interpretation consistent with public interest in majority power to make necessary changes.³⁸ But no doubt there is a point, to be measured in terms of unfair and arbitrary action beyond which the majority may not go, and as to which it may

respect which might have been originally provided in its articles, subject, of course, to the required statutory vote."

"It was further held (p. 574) that the statutes authorizing a corporation to amend its articles of incorporation are as effectively a part of certificates of stock issued thereby and of the corporate charter as though printed therein; and a person acquiring corporate stock consents in advance (p. 577) to the making of such change in the articles, as the statutes in effect at the time of such acquisition permit; and an exercise of the right by the state or by a prescribed majority of the stockholders of the corporation is neither an impairment nor a breach of the contract of such stockholder."

³⁷ Wis. Stat. (1943), sec. 180.07.

³⁸ *Johnston v. Bradley Knitting Co.*, 228 Wis. 566, 280 N. W. 688, 117 A.L.R. 1276 (1938), noted in 1943 Wis. L. Rev. 417, 1944 Wis. L. Rev. 65 at 66. This case does not by any means hold, as was intimated in 1944 Wis. L. Rev. 65 at 70, "that the requisite statutory majority can amend a corporation's charter in almost any respect." It held only that the changes made in this case with reference to preferred stock were within majority power under section 180.07, and section 182.13, which deals specifically with preferred stock and its preferences, and the amendments made were upheld because they were such as might have been provided in the original articles. At page 579 the Court stated: "In the case at bar, the incidents of the preferred stock changed by amendment were * * * the ordinary preferences provided by the articles and authorized by sec. 182.13." Obviously this does not justify a conclusion that, for instance, the majority could by amendment provide for cumulative voting, or merger with another corporation. The statutes, sec. 182.13, deal specifically with preferred stock and its preferences. They do not mention or authorize cumulative voting or merger. And in the absence of express statutory authority, consolidation and merger, and apparently cumulative voting, are beyond corporate power. 15 Fletcher, *Cyclopedia Corporations*, perm. ed. (1931), sec. 7048; 5 *Ibid.*, sec. 2048; 18 Op. Atty. Gen. (Wis. 1929), p. 429. See also *Milwaukee Sanitarium v. Lynch*, 238 Wis. 628, 300 N. W. 760 (1941); *Hull v. Pfister & Vogel Leather Co.*, 235 Wis. 653, 294 N. W. 18 (1940); 31 Atty. Gen. (Wis. 1942), p. 354; for other discussions of the *Bradley Knitting* case, see Nemmers, "Corporations—Accrued Preferred Dividends in Wisconsin," 1943 Wis. L. R. 417; Hale, "The Work of the Wisconsin Supreme Court: Business Associations," 1944 Wis. L. R. 64.

be decided the minority never agreed upon its purchase of stock. Past accrued dividends do not appear to have been destroyed in the *Bradley Knitting* case, and it cannot be said from this decision that majority action can destroy them in Wisconsin. Plaintiff had a claim to \$35 per share of accrued but undeclared dividends. The stockholders authorized a dividend of \$20, and this was offered in dividend warrants. The Court held plaintiff could have his \$20 in cash, making no decision as to the remaining \$15 in undeclared accrued dividends. The decision further refused relief against amendments in relation to preferred stock preferences which reduced the future dividend rate, changed the ratio of quick net assets to outstanding stock, and reduced the required percentage of profits for the sinking fund. The decision went a long way, but it did not go all the way by any means; and it permitted the changes only with reference to the business exigencies of the particular situation.

Such analysis perhaps suggests there is no problem concerning majority power to act under retroactive legislation. If such legislation is reasonable and does not unduly destroy "vested" interests, it may be interpreted as within majority power where exercised in good faith, regardless of the subject matter concerned. That this is not a safe conclusion is evident upon consideration of powers and procedures clearly not authorized under a particular corporate statutory system.³⁹ The *Bradley Knitting* case involved preferences of preferred stock, a matter concerning which majority power was

³⁹ Cases in which action under a statute, effective after the complaining stockholder acquired his stock, has been sustained expressly on the ground that such action was within original majority amending power are not numerous. In *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657 (1904), plaintiff became a member of an insurance company organized on the assessment plan in 1892. The majority, pursuant to a Minnesota statute of 1901, changed to the regular premium basis, and plaintiff brought a bill asking dissolution on the theory the corporate contract had been impaired by action under the legislation. The Court held the change within the power of the majority under the original charter, stating at page 665: "The argument for appellants is that, having begun as an assessment company, the plan can never be changed without the consent of all interested. But we have seen that the right of amendment was given in the original articles of association. There was no contract that the plan of insurance should never be changed. On the contrary, it was recognized that amendments might be necessary. There was no vested right to a continuation of a plan of insurance which experience might demonstrate would result disastrously to the company and its members. We are cited to the statutes of many states authorizing similar changes and transfer of membership, but to no case holding legislative authorization of a change of this character to work the impairment by the State of the obligation of a contract." See also *Kreicker v. Naylor Pipe Co.*, 374 Ill. 364, 29 N. E. 2d. 502 (1940), noted in 8 U. of Chic. L. Rev. 134 (1940), where amendments affecting plaintiff's preferred stock were made in 1936 under majority power conferred in the 1933 Illinois Business Corporations Act. Plaintiff acquired his stock in 1930, and the corporation had been formed under the 1919 General Corporation Act. The court stated at page 507: "The corporation had the statutory power under the 1919 act to amend its articles of incorporation in the manner it did, and by appellant's acceptance of the stock, he agreed to be bound * * *."

spelled out in Section 182.13, a part of the stockholders' contract. In Wisconsin such matters as cumulative voting, merger and consolidation are nowhere spelled out in or apparently to be implied from the business corporation statutes.⁴⁰ Beyond doubt majority

⁴⁰ 15 Fletcher, *Cyclopedia Corporations*, Rep. Vol. (1938), sec. 7048; 2 Morawetz, *Private Corporations*, 2d. ed., sec. 940 (1886); statutory consolidation and merger is authorized by Wis. Stat. (1945), sec. 181.07, newly created by Laws of Wis. (1945), Ch. 48, but for nonstock corporations only. It has been held that cooperative associations organized under Wis. Stat. (1943), Ch. 185, have the power of consolidation and merger through sale of assets to a new corporation in exchange for its stock under section 185.12, which gives an association power to "purchase the business of another corporation" and to "pay for the same * * * by issuing to the selling corporation * * * shares of * * * stock." *Pearson v. Clam Falls Co-op Dairy Asso.*, 243 Wis. 369, 10 N. W. 2d. 132 (1943). Some results may be achieved by business stock corporations under section 182.01 (10), empowering corporations to acquire and hold stock in other corporations, through the use of variations of the holding company device. See *Hoberg v. John Hoberg Co.*, 170 Wis. 50, 173 N. W. 639 (1919). This power, coupled with power under section 180.11 (2), to "sell * * * all * * * of the property owned by it * * * whenever it shall become necessary for its business" may give power through sale of assets in exchange for stock to effect what amounts to a consolidation or merger, when the power of dissolution is exercised in addition. See *McDermott v. O'Neill Oil Co.*, 200 Wis. 423, 228 N. W. 481 (1930). Such procedure does not amount to the same thing as consolidation or merger under modern statutes roughly requiring only corporate action on agreements by the corporations involved, and proper filing of the same. *Illinois Rev. Stat.* (State Bar Asso. ed. 1945), Ch. 32, secs. 157.61-157.69. The sale procedure is much more complex, involving numerous transfers of property, much corporate action, and often dissolution proceeding. It is more expensive and the possibility of error, and unexpected liability incurred by those involved, is much greater. But the simplified procedure for consolidation and merger is lacking in the Wisconsin statutes, except as to nonstock corporations, and certainly can nowhere be implied. Query whether section 180.11(2) is sufficiently broad to authorize consolidation by sale of assets on the part of a going concern to another corporation for its stock. There was no such power at common law, and this being true, statutes like section 180.11(2) simply authorizing sale of all assets may be construed strictly to include only cases where sale and dissolution are required by business exigencies, denying the power to going concerns, and denying the power to sell for stock, as at common law. Certainly no intention to override the common law is apparent in section 180.11(2), even taken in connection with section 182.01(10). See 6 Fletcher, *Cyclopedia Corporations*, perm. ed. (1931), sec. 2946, 2947; 13 *Ibid.*, sec. 5798; 15 *Ibid.*, rep. vol. (1938), (sec. 7054, 7216; Warren, "Voluntary Transfers of Corporate Undertakings," 30 *Harv. L. Rev.* 335 (1917); Hills, "Consolidation of Corporations by Sale of Assets and Distribution of Shares," 19 *Calif. L. Rev.* 349 at 352 (1931); *American Seating Co. v. Bullard*, (C.C.A. 6th, 1923), 290 F. 896. Statutes in other states grant clear authority to a going concern to sell all assets in exchange for stock in another corporation, and are much more explicit than in section 180.11(2). See *Illinois Rev. Stat.* (State Bar Asso. ed. 1945), Ch. 32, secs. 157.71, 157.72. *McDermott v. O'Neill Oil Co.*, supra, is not clear authority for a going concern because the power was not questioned, the Court considering only the question of good faith in the exercise, and the corporation involved was contemplating dissolution, placing the case within the "exigencies of the business" doctrine at common law. Consolidation of church corporations is provided for in Wis. Stat. (1943), sec. 187.14. For general authority that no consolidation is possible in absence of legislative sanction, see *St. Thomas Gemeinde v. St. Matthews Church*, 191 Wis. 340, 210 N.W. 942 (1926), involving two church corporations. With reference to insurance corporations see *Union Indemnity Co. v. Smith*, 187 Wis. 528, 205 N.W. 492 (1925). See also *Wegner v. Sheboygan-Elkhart Lake R. & E. Co.*, 171 Wis. 325, 176 N.W. 865 (1920); *Pennison v. The Chicago, Milwaukee & St. Paul R. Co.*, 93 Wis. 344, 67 N.W. 702 (1896). For authority with reference to cumulative voting see 18 *Op. Atty. Gen.* (Wis. 1929), p. 429; 5 Fletcher, *Cyclopedia Corporations*, perm. ed., sec. 2048 (1931).

action to impose such procedure upon an objecting minority could not be sustained under the present statutes. Such majority power can arise only from subsequent legislation, imposing a change upon the contract of the stockholder who previously acquired his stock.⁴¹ Such legislation may be written in language of compulsion, making it, as of its effective date, a part of corporate contracts generally. It may be written in a permissive style, awarding the corporation an option through majority action to write it in the articles.⁴² In either event the result is the same. Majority action subjects the objecting stockholder to something which was beyond majority power when he bought his stock. The compulsion in the permissive statute lies in the substitution of the rule of majority for that of unanimous action. Such statutes reside in the constitutional corner of the general field of majority corporate action.

LEGISLATIVE POWER TO INCREASE MAJORITY POWER GENERAL CONSIDERATIONS

When the desired action happens to be beyond majority power for corporate action, either expressly reserved by statute or implied from common law, then the last resort must be to a retroactive enabling statute from the legislature. The constitutional problems presented by such legislation have required judicial interpretation of the impairment of contract clauses in the federal⁴³ and state⁴⁴ constitutions, and of the clauses in state statutes and constitutions⁴⁵ reserving to the legislatures power to alter, amend and repeal corporate charters. The latter clauses were made necessary by the decision in the *Dartmouth College* case.⁴⁶ Although the language of the cases has been largely of the reserved power to alter and amend, parallels have been drawn to the police power of the state as limited by due process.⁴⁷

⁴¹ See *supra*, note 29, for authority that action under legislation authorizing consolidation or merger cannot be construed as within the stockholder's contract under the common law doctrine of non-fundamental changes.

⁴² 7 Fletcher, *Cyclopedia Corporations*, perm. ed., sec. 3717 (1931).

⁴³ United States Constitution, Art. 1, Sec. 10: "No state shall * * * pass any * * * law impairing the obligation of contracts, * * *."

⁴⁴ Wis. Const., Art. 1, Sec. 12: "No * * * law impairing the obligation of contracts, shall ever be passed, * * *."

⁴⁵ Wis. Const., Art. XI, Sec. 1: "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage." 7 Fletcher, *Cyclopedia Corporations*, perm. ed., sec. 3668 (1931).

⁴⁶ *Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518 (1819).

⁴⁷ See generally, Dodd, "Dissenting Stockholders and Amendments to Corporate Charters," 75 U. of Pa. L. Rev. 585, 723 (1927); Curran, "Minority Stockholders and the Amendment of Corporate Charters," 32 Mich. L. Rev. 743 (1934).

The profession is fully acquainted with the *Dartmouth College* case and its implications. The case held the relation between corporation and state to be that of contract within the meaning of the constitutional prohibition against impairment of contracts, and unquestionably in that day grants of land and other wholly executed transactions were classified in the field of contract.⁴⁸ The conclusion was not altogether unnatural in an age in which corporate charters were acquired by special concession from the sovereign, but it does appear anomalous today to one who views a corporate charter more as a contract between a group of people desiring to associate together in a business enterprise which is entered into, subject to, and in accordance with the requirements of general corporation statutes.⁴⁹ And the conclusion was necessary to the decision made, because due process was not available as a limitation upon arbitrary state legislation until after the effective date of the Fourteenth Amendment.⁵⁰ When that date arrived the doctrine of the *Dartmouth College* case already was deeply embedded in the law.

The result of historical evolution has been that legislative power over private property and contract interests generally has been defined in terms of state police power as limited by due process of law, and as to contracts also by the prohibition against their impairment, while virtually the same power of control over corporate organization has been defined in terms of the reserved power to alter and amend. In consequence judicial delimitation of the scope of the police power as such has not developed in the corporate direction. It has been extensively defined by the courts so far as its exercise in matters of public health, safety, and morals is concerned; but it has been only during the economic crises of the recent past that judicial definition of its scope and application to private contracts has commenced.⁵¹ It has been contended by some that definition of

⁴⁸ In *Fletcher v. Peck*, 6 Cranch 87 (1810, the Court had held a legislative land grant to fall within the protection of the prohibition against impairment of contracts.

⁴⁹ Berle, *Studies in the Law of Corporation Finance*, Ch. I; 1 Machen, *Modern Law of Corporations* (1908), secs. 1, 19, 20. The contract between the stockholders *inter se* was not before the Court in the *Dartmouth College* case because the College was a charitable and educational institution, and did not have members in the sense that a business corporation has stockholders. In essence the case involved a quarrel between the state and the corporation as an entity,

⁵⁰ United States Constitution, Amendment Fourteen, which became effective in 1868.

⁵¹ *Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127 (1905); *Marcus Brown Holding Company v. Feldman*, 256 U. S. 170, 41 S. Ct. 465 (1921); *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 42 S. Ct. 289 (1922); *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231 (1934); *Veix v. Sixth Ward Association*, 310 U. S. 32 at 38-39, 60 S. Ct. 792 (1940), where Justice Reed, speaking of the police power of the state, stated: "Such authority is not limited to health, morals and safety. It extends to economic needs as well." And at page 40, "This power of the State to protect its citizens by statutory

legislative power over the corporation in terms of the reserved power should be halted, and definition begun anew in terms of the police power.⁵² However such re-definition is hardly to be expected at this late date in the face of the long line of decisions interpreting the reserved power on the one hand, and the existing uncertainty as to the limits of the police power as such when applied to corporate organization on the other.

One might ask what difference it makes whether legislative power is defined in terms of police power or of the reserved power to amend, if there is no difference in kind between them. The answer is that because of the different specific sources of power, there have developed variations of degree in interpretation. In the majority of states and in the federal courts the reserved power has been broadly defined somewhat in step with the development of the police power in other fields. But in a small minority of states, including Wisconsin, under the spell of old decisions, the reserved power is narrowly defined as limited to the so-called contract relation between corporation and state, and as not sufficiently wide in scope to permit legislative change to the contract of stockholders *inter se*, through increase of majority power thereunder.

One more point will be raised before considering specifically the two views which have developed concerning the scope of the reserved power. It concerns the finality in the federal courts of a state court decision affirming the restricted view of the reserved power in favor of a dissenting stockholder. The Wisconsin Constitution contains a prohibition against legislative impairment of contracts as well as a reserved power to alter general corporation laws; and the Wisconsin Supreme Court decision, if based wholly upon construction of these provisions, will be followed in the federal courts unless the construction violates a federally protected right.⁵³ And certainly the dissenting stockholder who wins his case will not complain for lack of due process. The state court should be free to place its own construction upon the prohibition against impairment of contracts con-

enactments affecting contract rights, without violation of the contract clause of the Constitution, is analogous to the power often reserved to amend charters." See also, *Mutual Building and Savings Association v. Willing*, 221 Wis. 563, 267 N.W. 297 (1936).

⁵² Doe, "A New View of the Dartmouth College Case," 6 Harv. L. Rev. 161 (1893), and Judge Doe's opinion in *Dow v. Northern R.R.*, 67 N.H. 1, 36 A. 510 (1887), in which it is contended that the situation which would have existed had the Dartmouth College case been decided the other way should be restored. See also *Huber v. Martin*, 127 Wis. 412, 105 N.W. 1031 (1906), where the court decides the case on the basis of the police power as limited by due process and the prohibition against impairment of contracts, without mention of the reserved power.

⁵³ *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938); *Hottenstein v. York Ice Machine Co.*, (C.C.A. 3d. 1943), 136 F. 2d. 944; *Barrett v. Denver Tramway Corp.*, (D. C. Del. 1944), 53 F. Supp. 198.

tained in the state constitution so long as such construction is no broader than that of the United States Supreme Court under the similar provision in the Federal Constitution. It will be observed that the cases placing a narrow scope upon legislative power under the reserved power to amend do so as a matter of construction of the reserved power clause alone. It does not follow that a broader scope could not have been given without running afoul of the prohibition against contract impairment in the Federal Constitution.⁵⁴

SCOPE OF THE RESERVED POWER — THE TWO VIEWS

On the facts of the *Dartmouth College* case the Court was concerned with the relation between the state and the corporation viewed as an entity. It was not concerned in that case with the contract relations among the stockholders within the corporation. The Court labelled the former relation a contract, and Justice Story stated, "if the legislature mean to claim such authority" (to amend the charter) "it must be reserved in the grant".⁵⁵ Subsequently all the states reserved the power suggested by Justice Story, either in their constitutions or statutes, and in many cases it was included in special charters. Reflecting the trend away from special charters, most of the state provisions took the form of reservations to amend or alter the general corporation laws.⁵⁶

Of course these reservations became a part of the contract of every stockholder acquiring his stock after their effective dates, but their meaning in the contracts depended upon the scope given the power in the judicial decisions interpreting it. In the light of their history the reservations naturally were interpreted to authorize legislative action as to matters commonly understood to be involved in the relation between corporation and state. Obviously they authorized police regulations concerning corporate conduct with relation to outsiders. Such regulations fell naturally into the *Dartmouth College* fact situation. The confusion arose when statutes were considered which changed the contract relations of the stockholders inter se by awarding greater powers to the majority group. The facts in the *Dartmouth College* case afforded no clear precedent for a decision on these facts. Was such legislation included in the scope of the reserved power to amend, or was it unconstitutional as an impairment of private contract rights? If it would have been invalid if retroactively applied to partnership contracts, did the reserved power save it when applied to corporations? A liberal view saw in the reserved power a special

⁵⁴ See the discussion of this point in Dodd, "Dissenting Stockholders and Amendments to Corporate Charters," 75 U. of Pa. L. Rev. 585, 723 at 738-742 (1927).

⁵⁵ *Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.) 518 at 712 (1819).

⁵⁶ 7 Fletcher, *Cyclopedia Corporations*, perm. ed., secs. 3668-3672 (1931).

type of police power, operative upon the stockholder contract *inter se*, and justifiable on the basis of obvious factual differences between it and ordinary contracts. The narrow view restricted the scope of the power to cases falling within the facts of its origin.

Legislation exercising the taxing or police powers with reference to the relation between the corporation as an entity and the state or the outside public was generally considered by all courts as falling within the scope of the reserved power.⁵⁷ It was recognized that such legislation had at least an incidental effect upon the private interest of the stockholders and thus upon their contract, but it did not increase majority power as against the minority and the incidental effect was brushed aside by the cases.⁵⁸ The problem of determining whether certain legislation affected the contract of stockholders as well as the contract between corporation and state was inescapable if the artificial distinction between the two contracts was to be maintained. A small minority of states solved it by restricting the scope of the reserved power to legislation affecting only the relation between the corporation as an entity and the state or public, and denying any legislative power to change the contract of the stockholders *inter se* by authorizing increase of majority power under it.⁵⁹

⁵⁷ *Wisconsin Telephone Co. v. Public Service Commission*, 206 Wis. 589, 240 N.W. 411 (1932), sustaining, under the reserved power, a statute imposing upon public utilities the expense of state regulation. *Attorney General v. Railroad Companies*, 35 Wis. 425 (1874), where the court upheld the power of the state to prescribe maximum rates for passengers and freight. *West Wisconsin R.R. Co. v. Board of Supervisors of Trempealeau Co.*, 35 Wis. 257 (1874), where the Court upheld legislative power to repeal a tax exemption granted by prior statutes. *State ex rel. Martin v. Juneau*, 238 Wis. 564, 300 N.W. 187 (1941).

⁵⁸ This difficulty was discussed briefly in two early cases in Wisconsin. In *Attorney General v. Railroad Companies*, 35 Wis. 425 (1874), which involved legislation fixing maximum railroad rates, the court said at pages 578-579: "Of the same type is the argument that ch. 273 violates the contracts of these defendants with their creditors. This position appears to us to rest in the absurdity that the mortgagor can vest in his mortgage a greater estate than he had himself. Perhaps the statute may lessen the means of payment of the defendants. So would a fine for homicide, under the police power of the state. But to lessen the means of payment of a contract, is not to impair the obligation of the contract. These defendants took their franchises, and their creditors invested their money, subject to the reserved power, and suffer no legal wrong when it is exercised." And in *West Wisconsin R.R. Co. v. Board of Supervisors of Trempealeau Co.*, 35 Wis. 257 (1874), concerning a statute repealing a corporate tax exemption, the Court said at page 271: "The original corporators, or subsequent stockholders, or bondholders, took their interests with knowledge of the existence of this reserved right on the part of the state of repealing the exemption acts, * * *".

⁵⁹ 1 Morawetz, *Private Corporations*, 2d ed., secs 404, 406 (1886); *Allen v. Francisco Sugar Co.*, 92 N.J.Eq. 431, 112 A. 887 (1921); *Dow v. Northern R.R.*, 67 N.H. 1. 36 A. 510 (1887); *Avondale Land Co. v. Shook*, 170 Ala. 379, 54 So. 268 (1911); *Garey v. St. Joe Mining Co.*, 32 Utah 497, 91 Pac. 369 (1907); *Snook v. Georgia Improvement Co.*, 83 Ga. 61. 9 S.E. 1104 (1889); *Atlanta Steel Co. v. Mynahan*, 138 Ga. 668, 75 S.E. 980 (1912); *Yoakum v. Providence Baltimore Hotel Co.*, 34 F. 2d. 533 (1929); query as to Minnesota, see *Mower v. Staples*, 32 Minn. 284, 20 N.W. 225 (1884); *Midland Co-operative Wholesale*

This view was followed in the decade of the eighteen sixties by the courts of three states.⁶⁰ Wisconsin was one of these, and its cases will be considered separately in the next section. It has become known as the New Jersey view, although some of the New Jersey cases quite clearly depart from it.⁶¹ The view in effect denies any real operative effect to the reserved power, since the legislature possesses the taxing and police powers independently of the reserved power. It denies to the legislature any more power to change the contract of the stockholders than it has to change the contract of partners or private contracts generally. The power of the majority to take corporate action may not be increased by statute.

The majority view, named for the Delaware cases and followed in the federal courts as well, holds that the reserved power authorizes legislative change to the contract of stockholders *inter se*. The purchaser of stock contracts with reference to legislative power to increase majority power for corporate action by retroactive statute.⁶² Logical development of this view places no limit upon legislative power over the contract of stockholders, because no stockholder's right logically can become vested against the reserved power.⁶³ However, equitable limitations upon legislative power to affect stockholder interests were born almost with the doctrine. The limitations placed have been said to parallel due process,⁶⁴ but the language of limitation is not exactly that of due process. In *Looker v. Maynard*⁶⁵ the Supreme Court upheld retroactive legislation authorizing cumulative voting. The Court stated the limitations upon legislative reserved power to amend as follows:⁶⁶

"The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general

v. Range Co-operative Oil Ass'n., 200 Minn. 538, 274 N.W. 624 (1937), noted in 36 Mich. L. Rev. 660 (1938). The view is analyzed in Stern, "The Limitations of the Power of a State under the Reserved Right to Amend or Repeal Charters of Incorporation," 53 U. of Pa. L. Rev. 1 (1905).

⁶⁰ *Zabriskie v. Hackensack & N.Y.R.Co.*, 18 N.J.Eq. 178 (1867); *Woodfork v. Union Bank*, 3 Cold. 488 (Tenn. 1866); *Kenosha, Rockford and R.I.R. Co. v. Marsh*, 17 Wis. 13 (1863).

⁶¹ *Bingham v. Savings Investment & Trust Co.*, 101 N.J.Eq. 413, 138 A. 659 (1927), *aff'd*, 102 N.J.Eq. 302, 140 A. 321 (1928), involving consolidation.

⁶² 7 Fletcher, *Cyclopedia Corporations*, perm. ed., sec. 3718 (1931); *Durfee v. Old Colony & F-I River R.R.*, 5 Allen (87 Mass.) 230 (1862); *White v. Syracuse & Utica R.R.*, 14 Barb. (N.Y.) 559 (1853); *Matter of Mount Sinai Hospital*, 250 N.Y. 103, 164 N.E. 871 (1928); *Polk v. Mutual Reserve Fund Life Ass'n*, 207 U.S. 310, 28 S.Ct. 65 (1907); *Looker v. Maynard*, 179 U.S. 46, 21 S.Ct. 21 (1900).

⁶³ See discussion, "Corporations—Charter Amendments—Delaware Dilemma," 35 Mich. L. Rev. 620 (1937).

⁶⁴ Dow, "Corporations—Amendment of Corporate Charters—Power of the Legislature to Authorize Changes in Intra-Corporate Affairs," 34 Mich. L. Rev. 859 (1936).

⁶⁵ 179 U.S. 45, 21 S.Ct. 21 (1900).

⁶⁶ *Looker v. Maynard*, *ibid.*, at page 52.

law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs."

In the federal courts and state courts following the majority view the litigation has concerned definition of a "right vested under the grant," and what legislation is deemed to "defeat or substantially impair" it, and further as to what legislation will be considered to "defeat or substantially impair the object of the grant."⁶⁷ With respect to the majority view one line was drawn as to the extent of valid legislative interference with "vested rights" in *Keller v. Wilson & Co.*,⁶⁸ in which the Supreme Court of Delaware reversed the Delaware Chancellor.⁶⁹ This case held a preferred stockholder's right to accrued cumulative dividends was "vested", and could not be destroyed by majority action under statutes enacted after plaintiff acquired his stock. That rights even so vested as these are beyond majority power derived from subsequent legislation in Delaware has been rendered problematical by more recent decisions.⁷⁰ It is not the purpose of this article to discuss the majority view in detail. Many students of the subject feel that in Delaware the recent cases are approaching the logical extremities of the majority view, and are subjecting the preferred stockholder to insecurity and majority abuse unwarranted by any normal exigencies of corporate flexibility.

Under the majority view the equitable factors considered appear to parallel those referred to previously in connection with interpretation of majority power to amend implied at common law or reserved expressly in the original articles. The scope of legislative power is sufficiently broad to authorize amendments increasing majority power for corporate action in good faith and as required by legitimate

⁶⁷ *Shields v. Ohio*, 95 U.S. 319, 24 L. ed. 357 (1877); *Peters v. United States Mortgage Co.*, 13 Del. Ch. 11, 114 A. 598 (1921); *New York & New England R.R. v. Bristol*, 151 U.S. 556, 14 S. Ct. 437, (1894); cases collected in Curran, "Minority Stockholders and the Amendment of Corporate Charters," 32 Mich. L. Rev. 743 (1933).

⁶⁸ 21 Del. Ch. 391, 190 A. 115 (Sup.Ct. 1936); discussed in 35 Mich. L. Rev. 620 (1937); *Morris v. American Public Utilities Co.*, 14 Del. Ch. 136, 122 A. 696 (1923); *Davis v. Louisville Gas & Electric Co.*, 16 Del. Ch. 157, 142 A. 654 (1928).

⁶⁹ 21 Del. Ch. 13, 180 A. 584 (1935), discussed in 34 Mich. L. Rev. 859 (1936).

⁷⁰ *Havender v. Federal United Corp.*, Del. Ch., 11 A. 2d. 331 (Sup.Ct. 1940); *Shanik v. White Sewing Machine Corp.*, Del. Ch., 19 A. 2d. 831 (Sup.Ct. 1941); notes 39 Mich. L. Rev. 1201 (1941), and 57 Harv. L. Rev. 894 (1944); *Barrett v. Denver Tramway Corp.*, (D.C. Del. 1944) 53 F. Supp. 198.

business need, but not broad enough to warrant unfair and discriminatory legislative destruction of the security of private investment. Under the majority view, in states with extremely complete corporate statutory systems including broad general powers of amendment, it is to be expected there will be few cases in the future where action newly authorized by the legislature is not already included in majority amending power. In the recent Delaware cases it is often difficult to determine whether the basis of decision is constitutional, or whether the court is deciding on the basis of the 1927 statute which conferred on the majority a broad general power of amendment.⁷¹ But in states adhering to the minority view of legislative power the problem is critical, particularly where the corporate statutory system is far from complete. If the proposed action does not fall within majority power for corporate action implied at common law or expressly conferred in pre-existing statutes, the majority is out. It does not get another strike by resort to a later statute passed by the legislature under its reserved power to alter or amend.

THE WISCONSIN CASES

In Wisconsin the case which appears to commit the State to the minority doctrine is *Kenosha, Rockford and Rock Island Railroad Company v. Marsh*,⁷² decided fifteen years after the effective date of the Wisconsin Constitution. In 1853 plaintiff railroad was chartered to build a line from Kenosha to Beloit. In 1857 the railroad was authorized by state statute to build its line from Kenosha to the Illinois line near Genoa, and still another statute later authorized consolidation with an Illinois company building to Genoa from Rockford, Illinois. The consolidated company sued defendant on his stock subscription, and was nonsuited on the theory that the corporate action taken under these statutes had effected a radical, fundamental change in the character of the enterprise to which the subscriber had not assented.

⁷¹ This is apparent from reading the decision in *Keller v. Wilson & Co.*, supra, note 68.

⁷² 17 Wis. 13 (1863); The Wisconsin Supreme Court has cited this case eight times in the eighty-three years since it was decided, and each time it has been accepted as governing in the context in which it was cited. *Attorney General v. Railroad Companies*, 35 Wis. 425 at 570, 571 (1874); *Attorney General v. West Wisconsin Railway Co.*, 36 Wis. 466 at 496 (1874); *Noesen v. Town of Port Washington*, 37 Wis. 168 at 174 (1875); *Lynch v. Eastern, LaFayette & Mississippi Ry. Co.*, 57 Wis. 430 at 467, 15 N.W. 743 (1883); *Smith v. Northwestern National Life Insurance Co.*, 123 Wis. 586 at 593, 102 N. W. 57 (1905); *Superior W. L. & P. Co. v. Superior*, 174 Wis. 257 at 271, 272, 181 N.W. 113 (1921); *Martin Orchard Co. v. Fruit Growers C. Co.*, 203 Wis. 97 at 104, 233 N.W. 603 (1930); *Johnson v. Bradley Knitting Co.*, 228 Wis. 566 in dissenting opinion at 590, 280 N.W. 868 (1938). The case has been cited twice in the federal courts: *Superior Water Co. v. Superior*, 263 U.S. 125 at 136, 44 S.Ct. 82 (1923), reversing *Superior W. L. & P. Co. v. Superior*, supra; and *Venner v. Atchison, T. & S. F. R. Co.*, 28 F. 581 at 588 (C.C. Kansas, 1886).

The Court held that the majority under their amending power implied from the charter at common law had no power to bind a dissenter to such a change as this without further statutory authority, and then passed to the question as to whether such power could be obtained by virtue of a later statute. In the language of the Court:⁷³

"The question then remains, whether the power reserved in the constitution to amend, alter or repeal charters should prevent that effect. Some of the cases seem to place great stress upon the existence of this power, and to intimate that under it the nonassenting stock subscriber may be bound by a change, the effect of which would otherwise be to release him. I am wholly unable to see that it should have any such effect.*** this power was never reserved upon any idea that the legislature could alter a contract between a corporation and its stock subscribers, nor for the purpose of enabling it to make such alteration. It was solely to avoid the effect of the decision that the charter itself was a contract between the state and the corporation, so as to enable the state to impose such salutary restraint upon these bodies as experience might prove to be necessary."

The same result might have been reached by holding the change in the enterprise to have involved substantial defeat and impairment of the object of the grant; and thus to have been beyond the pale of those changes possible in the contract of the members *inter se*, even under the broader definition of the scope of reserved power. A decision on this basis would have been in line with the present day majority rule, and would have left the legislature free to effect by statute reasonable increases in majority power for corporate action. But the Court quite clearly turned its back upon this approach, and restricted the scope of the legislative reserved power to those matters falling within the relation between the state and the corporation as an entity. The Court stated:⁷⁴

"So that, in all cases where charters are changed, the right to bind stock subscribers who do not assent, seems to me to derive no additional support from the fact that the power of amending the charter had been reserved, but to depend essentially upon the question whether the change is of such a character that it may be deemed so far in furtherance of the original undertaking, and incidental to it, as to be fairly within the power of the corporation to bind its individual members by its corporate assent, or whether it is such a departure from the original purpose that no member should be deemed to have authorized the corporation to assent to it for him. If I am correct in supposing that an amendment authorizing

⁷³ Kenosha, Rockford & Rock Island Railroad Company v. Marsh, 17 Wis. 13 at pages 16-17 (1863).

⁷⁴ Ibid., at page 18.

an entirely different road would not be binding on the corporation without its own assent, it must follow that the question whether any particular subscriber is bound must depend upon the question whether he has himself assented, or whether the rest could bind him by their assent, and not on the question whether the legislature had power to pass the amendment."

* * *

"The power of amendment was never reserved with reference to any question between the corporation and its stock subscribers, but solely with reference to questions between the corporation and the state, when the latter desired to make compulsory amendments against the wish of the former."

Possibly the Court so limited the reserved power in this case because of a feeling that the logical implications of its scope under the majority view would have required a holding that the change involved in the case was valid. Similar cases, involving extension and consolidation of railroads, were fairly common at the time; and some courts following the majority view were permitting changes at least as substantial as the one involved in the *Marsh* case.⁷⁵ But it is submitted the decision of the case did not require following such cases, and hence did not require the complete nullification of the legislative reserved power which it did involve.

Early Wisconsin cases reveal an abhorrence of the *Dartmouth College* doctrine, associated with a fear of the encroachment of corporate power upon sovereign prerogative, reminiscent of a much earlier period in English law.⁷⁶ At least in part, this attitude resulted from the events of the days of railroad expansion in the west. The outstanding case was *Attorney General v. Railroad Companies*,⁷⁷ which involved the power of the State to fix maximum rates by statute, and in which Chief Justice Ryan wrote a ninety-seven page opinion affording interesting insight into the social and economic struggle underlying the legal controversy then before the Court. With respect to the *Dartmouth College* case he stated:⁷⁸

⁷⁵ *Peoria & Oquaka R.R. v. Elting*, 17 Ill. 429 (1856); *Rice v. Rock Island & Alton R.R.*, 21 Ill. 93 (1859). The Court in the *Marsh* case, at page 20, indicated its fear of the logical implications of the majority view in the following language:

"Pierce, in his work on railroads, p. 98, gives it as the result of the authorities, that even when the power of amending is reserved, it is not unlimited, but 'that such a radical change in the company as diverts it from its original purpose' is not binding on a dissenting shareholder. But if the power is not unlimited, where is the limit? By what principles is it to be established? I know of none except those I have already contended for, which base the right upon the implied authority conferred by each one who becomes a member of the corporation, on the majority, to bind him by such changes as may fairly be regarded as incidental to the original project."

⁷⁶ 1 Pollock and Maitland, *History of English Law*, 2d. ed., 669-670 (1911).

⁷⁷ 35 Wis. 425 (1874); see also *Madison, Watertown and Milwaukee Plank-road Co. v. Reynolds*, 3 Wis. 287 (1854).

⁷⁸ *Ibid.*, at page 568.

"It deprives the states of a large measure of their sovereign prerogative, and establishes great corporations as independent powers within the states, a sort of *imperia in imperiis*, baffling state order, state economy, state policy."

This case involved rate regulation, a matter affecting the relation between the state and the corporation as an entity, a matter subject to the "salutary restraint" referred to in the *Marsh* opinion, and thus within the restricted scope of the reserved power as defined in the *Marsh* case. Chief Justice Ryan so held. He pointed out that the reserved power was made a part of the State Constitution, and thus:⁷⁹

"By force of the constitutional power reserved and of the uniform construction and application of it, the rule in the Dartmouth College case, as applied to corporations never had place in this state, never was the law here. The state emancipated itself from the thralldom of that decision, in the act of becoming a state;***"

Here, and in the *Marsh* case, is to be observed the early basis for the interpretation that the reserved power extends no further than the relation between state and corporation.⁸⁰ In Wisconsin at least, many of the early cases arose from the struggle between state and corporation involved in western railroad expansion. It was the *Dartmouth College* situation in reverse, with the shoe on the other foot. This time the corporations were in the saddle, and were the aggressors. Justice Story had suggested, and the State had availed itself of, the reserved power as a means to avoid the effect of the *Dartmouth College* case, and it was natural to assume the reserved power extended no further in scope than was required by the situa-

⁷⁹ *Ibid.*, at page 574.

⁸⁰ In *Attorney General v. Railroad Companies*, *supra*, at page 577, Chief Justice Ryan, referring to the reserved power in Article XI, section 1 of the Wisconsin Constitution, stated: "The power is limited by its own words only. Any limitation of it must come from those words. And we must be guided in our construction of the words used, if the words will admit of it, by the purpose of the provision, to do away in this state the rule in the Dartmouth College case so far as it relates to charters of private corporations." And in the *Marsh* case, at page 17, the Court stated: "The occasion of reserving such a power either in the constitution or in charters themselves is well understood. It grew out of the decisions of the supreme court of the United States, that charters were contracts within the meaning of the constitutional provision that the states should pass no laws impairing the obligation of contracts. This was supposed to deprive the states of that power of control over corporations which was deemed essential to the safety and protection of the public. Hence the practice, which has extensively prevailed since those decisions, of reserving the power of amending or repealing charters. But this power was never reserved upon any idea that the legislature could alter a contract between a corporation and its stock subscribers, nor for the purpose of enabling it to make such alteration. It was solely to avoid the effect of the decision that the charter itself was a contract between the state and the corporation, so as to enable the state to impose such salutary restraint upon these bodies as experience might prove to be necessary."

tion which created it. And so the Court stated its scope could not include the contract of the stockholders *inter se*; could not authorize legislative increase of majority power; even though such statement was not necessary in most of the decisions in which it was made. Even in the *Marsh* case such restriction of the reserved power might have been avoided by holding that the change in enterprise involved there was too broad and substantial even under the reserved power to be binding upon dissenters.

There have been other cases concerning the same issue as the *Railroad Companies* case, involving the liability of local public utilities to regulation,⁸¹ legislative power to repeal a corporate tax exemption,⁸² to impose on public utilities the expense of state regulation,⁸³ and to compel a municipal corporation to comply with health regulations concerning water pollution.⁸⁴ The *Marsh* case has been cited, but its rule has not been modified. Many cases, like the *Bradley Knitting* case,⁸⁵ have involved corporate power to take certain action against the complaint of dissenting members that the proposed action exceeded corporate power as defined in their original contracts. In some of these cases the *Marsh* case has been cited for the proposition that a fundamental, radical change in corporate purpose violates the contract. No question of legislative impairment of the contract is involved in such cases.

Nazro v. Merchants Mutual Insurance Company,⁸⁶ decided before the *Marsh* case, contains dictum possibly in conflict with it;

⁸¹ *Superior Water, Light and Power Co. v. City of Superior*, 174 Wis. 257, 181 N.W. 113 (1921), reversed, 263 U.S. 125, 44 S. Ct. 82 (1923); see also *State v. Milwaukee Gas Light Co.*, 29 Wis. 454 (1872); *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N.W. 131 (1912); *State ex rel. Attorney General v. Northern Pacific R. Co.*, 157 Wis. 73, 147 N.W. 219 (1914); *Wisconsin Traction, L., H. & P. Co. v. Menasha*, 157 Wis. 1, 145 N.W. 231 (1914); *State ex rel. Northern Pacific R. Co. v. Railroad Commission*, 140 Wis. 145, 121 N.W. 919 (1909).

⁸² *West Wisconsin R.R. Co. v. Supervisors of Trempealeau Co.*, 35 Wis. 257 (1874); also *State v. Railway Companies*, 128 Wis. 449, 108 N.W. 594 (1906), involving the taxing power.

⁸³ *Wisconsin Telephone Co. v. Public Service Commission*, 206 Wis. 589, 240 N.W. 411 (1932).

⁸⁴ *State ex rel. Martin v. Juneau*, 238 Wis. 564, 300 N.W. 187 (1941); Statute required railroads to fence their lines, *Blair v. Milwaukee & Prairie du Chien Rd. Co.*, 20 Wis. 254 (1866). The court stated the police power was sufficient to justify the regulation, and refused to discuss the applicability of the reserved power to amend. See also *Water Power Cases*, 148 Wis. 124, 134 N.W. 330 (1912).

⁸⁵ *Johnson v. Bradley Knitting Co.*, 228 Wis. 566, 280 N.W. 688 (1938); *Martin Orchard Company v. Fruit Grower's Canning Co.*, 203 Wis. 97, 233 N.W. 603 (1930); *Attorney General v. West Wisconsin Railway Co.*, 36 Wis. 466 (1874), quo warranto on theory corporation was acting in excess of charter power; *Noesen v. Town of Port Washington*, 37 Wis. 168 (1875); *Lynch v. Eastern, LaFayette and Mississippi Railway Co.*, 57 Wis. 430 (1883); *Welch v. Land Development Co.*, 246 Wis. 124, 16 N.W. 2d. 402 (1944); *Milwaukee Sanitarium v. Swift*, 238 Wis. 628, 300 N.W. 760 (1941); *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 149 N.W. 754 (1915).

⁸⁶ 14 Wis. 319 (1861).

but the constitutional issue was not before the Court. In this case the legislature, by acts dated 1858 and January, 1860, authorized the corporate trustees to change the organization of the company from the mutual to the joint stock plan. In April, 1860, as a part of the amending scheme, the legislature made effective a statute permitting dissenters to obtain the value of their memberships as determined by court appointed appraisers. Instead of suing to enjoin the whole statutory amending scheme, the plaintiff sued under it for the value of his stock pursuant to the appraisal statute. The Court upheld plaintiff's right to proceed under the statute, and its remarks on the constitutional issue must be considered dictum. The Court stated:⁸⁷

"It seems to be conceded on both sides, that it was competent for the legislature, both by virtue of the power reserved in the organic act of the company, and of section 1 of article XI of the constitution, to pass the amendatory acts of April 15, 1858, and January 31st, 1860, by which the trustees were authorized to change the plan and organization of the company from the mutual to the joint stock system. Indeed, with a single exception, none of their provisions appear liable to any constitutional objection whatever. The first section of the first named act declares that the *trustees* may adopt the mode of insuring practiced by insurance companies; and may open books for the subscription of stock, at such time and place and under such restrictions as they may deem proper. This is a grant to the trustees of new and distinct powers, such as they could not before have exercised, either as a matter of corporate authority or of legal or constitutional right, as between themselves or the corporation and the shareholders. The latter might have objected to it as a violation of the contract under which they became members of the company. But for the reserved power of the legislature to alter or repeal the charter, this objection would be still open to them."

Thus the Court approved a doctrine apparently contrary to that later pronounced in the *Marsh* case. But in the next sentence the Court stated:⁸⁸

"If the act had declared that the members might adopt a new mode of insurance, and open books for the subscription of stock, no exception could have been taken to it. It would then have required the assent of all the members to have accomplished the proposed change."

The Court appeared concerned over the distinction between permissive and compulsory statutes; but what matters it to the dissenter whether his contract is changed directly by the trustees under a

⁸⁷ Ibid., at pages 324-325.

⁸⁸ Ibid., at page 325.

"compulsory" statute, or through majority stockholder action under a statute "permitting" such action?

Likewise, in *Smith v. Northwestern National Life Insurance Company*,⁸⁹ a statute of 1899 gave to mutual insurance companies the power to change to a premium basis. The company involved, organized as a mutual company in 1891, proceeded to take advantage of the statute. Plaintiff, a mutual member, brought suit for the value of his interest. The Court held the statute valid because it had provided particularly against change in the interests of mutual members, but made the following pertinent comments:⁹⁰

"In construing such statute it must be remembered that the state has only reserved power to modify the contract between itself and the corporation which is involved in the latter's charter or franchise, and that the constitutional prohibition against impairing the obligation of contracts was in full force in protection of any contracts which a corporation might have made with others." (Citing the *Nazro* and *Marsh* cases)

On the next page, the Court branded the above remark as dictum, stating:

"So we must conclude that the legislature intended no impairment of plaintiff's contract, and any discussion of its powers in that respect is but academic."

Then there is the case of *Huber v. Martin*,⁹¹ decided in 1906, in which, oddly enough, Justice Marshall did not refer to the *Marsh* case, the *Nazro* case, or any of the Wisconsin cases which followed them, although the facts of the case and the basis of decision clearly involved the issues here discussed. Plaintiffs were members in a mutual insurance company, organized in 1854. They sued for equitable relief against a reorganization which involved creation of a new corporation to take over the business on a stock basis. The reorganization was undertaken under a general statute of 1903, which authorized conversion of mutual companies to stock companies. The Court stated members in mutual insurance companies were stockholders, the same as stockholders in any business corporation, and entitled to the same consideration. The reorganization statute was held unconstitutional because retroactive, and the decision, in general, is on all fours in result with the *Marsh* case, although that case was not mentioned, nor was the *Dartmouth College* case. The Court approved a New Jersey case following the minority doctrine,⁹² but did not discuss

⁸⁹ 123 Wis. 586, 102 N.W. 57 (1905).

⁹⁰ *Ibid.*, at page 593.

⁹¹ 127 Wis. 412, 105 N.W. 1031 (1906); 132 Wis. 86, 111 N.W. 1107 (1907).

⁹² *Schwarzwaelder v. German Mutual Fire Insurance Co.*, 59 N.J.Eq. 589, 44 A. 769 (1899).

the reserved power or follow the reasoning of the cases interpreting it. In the words of the Court:⁹³

"The right of the corporation to hold its property in harmony with that situation, and the rights of the members to have the same so held and administered, were property interests resting on contractual obligations and so within the guaranty of the state constitution as regards the passage of laws impairing the obligations of contract, sec. 12, art. I, Const. of Wis., and that of the national constitution as regards the deprivation of property without due process of law, or denying to persons the equal protection of the laws. XIVth Amend. U. S. Const. Due process of law does not extend to the taking of private property or the violation of private rights for private ends. The act of the legislature in question, in terms or in effect, authorizes the appropriation of the property of one private corporation and the equitable interests therein of the members thereof to the use of another private corporation and of its members in violation of the corporate charter rights of the former corporation, and in defiance of the wishes of such of its members as do not choose to consent thereto. The proposition affirmed by counsel for respondents, stated at the outset in the opinion, must, therefore, be answered in the negative. The act of the legislature, ch. 229, Laws of 1903, is unconstitutional and void and furnishes no justification for the acts complained of."

This decision might well be classed among those few supporting the position that legislative power over the corporate contract should be considered in terms of the police power and due process, without even lip service to the reserved power to amend.⁹⁴ This position need not, like the minority view of the reserved power, result in nullification of any legislative power to increase majority corporate power. However, it has been pointed out before in this article that decisions such as this one stand alone; the law has not developed along this line; and it is doubtful if it will in view of the mass of decisions dealing with the subject in terms of the reserved power to alter or amend.

⁹³ *Supra*, note 91, at page 439. The constitutional issue was ineffectually raised in another insurance company case, *Wisconsin T.M.R. Co. v. Calumet C.M.F. Ins. Co.*, 224 Wis. 109, 271 N.W. 51 (1937), where the Court stated at pages 119-120: "As to the defendant's contention raised by the amendment to the answer that secs. 202.15 to 202.18, inclusive, Stats., are unconstitutional and void as to the contracts of members of defendant company, we are of the opinion that there is no invasion of the rights of individual members or of the defendant, nor violation of any constitutional provision. There was no particular effort to show what policies of defendant company were in force before these statutes were passed, and contracts made after that time must have been made in contemplation of the statutes." See *Wright v. Minnesota Mutual Life Insurance Co.*, 193 U.S. 657, 24 S.Ct. 594 (1904), where the opposite result was reached by a court following the majority view, but where the court found the changes in issue to have been included within original majority amending power.

⁹⁴ See note 52, *supra*.

The case of *State ex rel. Cleary v. Hopkins Street Building and Loan Association*⁹⁵ has been stated previously, but its constitutional aspect was left to this point for discussion. The court held that the Federal Home Owner's Loan Act did not intend "conversion" of a state building and loan association to federal incorporation unless the state had legislation authorizing its corporation to act under the federal statute.⁹⁶ There was no state enabling legislation in the case, so no constitutional issue was decided. However, the court did discuss the situation which would have been presented had the federal act by its terms authorized action under it without regard to state authorization, and concluded:⁹⁷

"*** it would divest stockholders of their rights in the corporation under state law and substitute therefor rights alleged to be equivalent in a corporation organized under the laws of the United States. As pointed out elsewhere in this opinion, this would raise serious constitutional questions, for a corporate charter is not only contractual between the state and its creature corporation, but it is also contractual with respect to the rights of a stockholder in a corporation."

It would seem any stockholder could make the same constitutional complaint should his corporation proceed to merge or consolidate with another corporation, foreign or domestic, under authority of a state statute effective after he acquired his stock. There also he would be forced to give up his stock, "and substitute therefor rights alleged to be equivalent" in another corporation. Or would it make a difference that the other corporation was of Illinois and not the United States?

The case contains further dictum, indicating at least no departure from the doctrine of the *Marsh* case. At another point the Court states:⁹⁸

"There can be no doubt but that it was intended by the framers of the constitution to reserve in the state the power to alter or repeal the charter of any corporation created by the legislature. The constitution having thus limited the power of the legislature, it would seem to follow that the legislature is without authority to divest itself of the power reserved to it by the constitution. But if it should be held that the legislature

⁹⁵ 217 Wis. 179, 257 N.W. 684 (1935), aff'd. 296 U.S. 315, 56 S.Ct. 235 (1935), noted in 19 Marq. L. Rev. 139 (1935).

⁹⁶ "There must be some plain enactment authorizing the merger or consolidation, for legislative authority is just as essential thereto as it is to the creation of the corporation in the first instance." 15 Fletcher, *Cyclopedia Corporations*, rep. vol., sec. 7048 (1938). Justice Cardozo, in the Supreme Court decision, held that the federal statute did intend "conversion," irrespective of state statutory authority therefore, and in that respect held the federal statute unconstitutional.

⁹⁷ *Supra*, note 95, page 192.

⁹⁸ *Supra*, note 95, 189-190.

has such power, it is still constitutionally disabled from authorizing any part of the stockholders of a corporation created by it, to impose a new charter upon non-consenting members of the corporation."

The cases discussed announce the rule that the reserved power is not sufficiently broad in scope to permit legislative change to the business contract of the stockholders in a corporation. In other words, legislation conferring previously non-existent majority power upon the majority is invalid as against an objecting minority which previously acquired its stock. Corporate action under such amendments requires unanimous stockholder consent. There are no direct holdings to this effect, other than the *Marsh* and *Huber* cases. But since the *Marsh* case a doctrine has been intoned which was not really necessary to the decision of the cases which sustained it, and which was dictum in most of them. That it is alive today is evidenced by a remark to be found in the dissenting opinion in the *Bradley Knitting Company* case:⁹⁹

"It was early held by this court that the clause of our state constitution reserving the right to change corporate charters after their adoption did not apply to the contract rights of stockholders secured by the corporate charter." (Citing the *Marsh* case).

CONCLUSION

Any discussion of legislation in the light of the cases discussed above can do little more than indicate the approach to the problem, and the difficulties to be encountered with different general types of statutes. Legislation amending the corporation statutes of the state may, for instance, be classified as compulsory or mandatory,¹⁰⁰ or permissive in character. So far as the interests of the dissenting stockholder are concerned, there appears little to differentiate the two. Even though the statute be permissive in its expression, its imposition of majority rule as to a matter which required unanimous action before, or was prohibited to the corporation altogether, is compulsory as regards the dissenter. Compulsory or permissive, the time for the dissenter to take action against the operation of the statute upon his rights is when the majority proposes action under it by corporate resolution.

It has been concluded that if proposed action is within majority power as expressly defined in, or to be implied from, the corporate contract as of the time the dissenter acquired his stock, then the dissenter is by his own contract subject to the proposed action, even if it is taken pursuant to a later statute, and has no valid complaint. This opens a broad field of inquiry which must be answered upon

⁹⁹ *Johnson v. Bradley Knitting Co.*, 228 Wis. 566 at 590, 280 N.W. 688 (1938).

¹⁰⁰ 7 Fletcher, *Cyclopedia Corporations*, perm. ed., sec. 3717 (1931).

the facts of each particular case. Within the scope of corporate power as defined within the present Wisconsin corporation statutes, the possible field of legislative action still within present majority corporate power may be fairly broad, particularly in view of the liberal interpretation of the *Bradley Knitting Company* case.¹⁰¹

Section 180.02,¹⁰² after enumerating matters to be contained in the articles, concludes with the provision: "Such other provisions, not inconsistent with law, as they may deem proper to be therein inserted." In other words, the incorporators, and the majority later through amendment under Section 180.07, may place in the articles provisions covering any matter of corporate procedure or power so long as they do not conflict with statutory provision concerning them, or with judicial decisions defining state public policy.¹⁰³ However,

¹⁰¹ *Supra*, note 99.

¹⁰² Wis. Stat. (1943), sec. 180.02.

¹⁰³ *Welch v. Land Development Co.*, 246 Wis. 124, 16 N.W.2d. 402 (1944), where holders of retired preferred stock claimed accrued cumulative dividends either as such, or their equivalent as interest on their investment. It was held there could be no lawful corporate authorization for the payments demanded because of limitations placed upon preferred stock preferences by Wis. Stat. (1943), secs. 182.13(1), and 182.19(1). The corporation could not, by amendment of its articles or otherwise, act in conflict with such statutory limitations. The Court stated at pages 131-132: "As the defendant, in its articles of incorporation, could provide for preferred stock in only the manner and subject to the above-stated limitations in secs. 1759a and 1765, Stats. 1911, it would have been beyond its power to provide in its amended Art III, or in any other manner, for the issuance of preferred stock which would not be subject to the statutory limitations that the preference, which may be given to such stock, is limited to 'not exceeding the par value thereof over the common stock in the distribution of the corporate assets other than profits,' and that 'no dividend shall * * * be declared or paid * * * except out of net profits properly applicable thereto and which shall not in any way impair or diminish the capital.' Those statutory limitations are as effectively a part of issued certificates of stock and as binding upon holders thereof as though they were printed thereon. * * * ; and to those statutory limitations there is applicable the rule that 'When the legislative will is expressed in the peremptory terms of such a statute, it 'is paramount and absolute, and cannot be varied or waived by the private conventions of the parties.' *Jones v. Preferred Accident Ins. Co.*, 226 Wis. 423, 426, 275 N.W. 897. Consequently, neither those limitations nor the additional limitation in sec. 1759a, that 'Neither preferred nor common stock shall bear interest,' can be avoided or waived or varied by any provision in defendant's articles of incorporation or other private conventions of the parties." See also 23 Ops. Atty. Gen. (Wis., 1934) 6, stating that under section 182.13, preferred stock must be preferred as to dividends, and cannot possess exclusive voting rights under any circumstances. See further *Hull v. Pfister and Vogel Leather Co.*, 235 Wis. 653, 294 N.W. 18 (1940); and for a permitted provision, *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 149 N.W. 754 (1915), holding valid a provision in the articles requiring original subscribers to offer their stock to the board of directors before offering it for sale to outsiders. *Farmer's M. & S. Co. v. Lann*, 146 Wis. 252, 131 N.W. 366 (1911); *Good v. Starker*, 207 Wis. 567, 242 N.W. 204 (1932); 31 Ops. Atty. Gen. (Wis., 1942) 354. *Milwaukee Sanitarium v. Swift*, 238 Wis. 628, 300 N.W. 760 (1941), held valid an amendment made to the articles in good faith which authorized issue of stock to employees and officers without recognizing plaintiff's asserted pre-emptive rights. It was pointed out that the pre-emptive right has certain recognized limitations based upon business necessity, and the stockholder is deemed to contract with reference to them.

where the state statutes entirely fail to mention an important matter of procedure or power, the question arises as to whether the door is open for provision concerning it in the original articles.

It is obvious that statutory consolidation and merger are majority powers which cannot exist in the absence of legislative sanction, and likely that practical accomplishment of the same thing by a going concern through sale of assets for stock in another corporation cannot be achieved in the absence of a statute more clearly authorizing such procedure than does Section 180.11(2). Quite clearly provision for consolidation and merger cannot be written into original articles today.¹⁰⁴ It has been concluded previously that majority action to effect them under new statutes would very likely be invalid against a dissenter as a fundamental change under the common law doctrine of implied charter power, and as a voidable assumption of previously non-existent charter authority under the doctrine of the *Marsh* case. It is submitted that a statute giving pre-existing Wisconsin corporations the power to merge or consolidate cannot be operative without unanimous shareholder consent, unless the doctrine of the *Marsh* decision is overruled.

Section 180.07(1)¹⁰⁵ gives the present corporation power to amend its articles by majority action, "to modify or enlarge its business or purposes, change its name or location, increase or diminish its capital stock, change its officers or its directors," and finally to "provide anything which might have been originally provided in such articles." There is the added limitation that "no corporation without stock shall change substantially the original purposes of its organization", possibly implying that stock corporations can do so. It does not appear that the clause allowing provision by amendment for anything eligible for inclusion in the original articles has been judicially interpreted as limited to those matters specifically enumerated immediately before it.¹⁰⁶ If, as appears, the clause is not so limited, there results a broad field of allowable amendment within the general clause in question. But, according to the minority view, this clause still does

¹⁰⁴ See *supra*, footnote 40.

¹⁰⁵ Wis. Stat. (1943), sec. 180.07(1).

¹⁰⁶ 7 Fletcher, *Cyclopedia Corporations*, perm. ed., sec. 3648 (1931). In *Johnson v. Bradley Knitting Co.*, *supra*, the Court stated at page 580: "Under sec. 180.07(1), Stats., a corporation may amend its articles of organization in any respect which might have been originally provided in its articles," and did not mention any of the specific matters, upon which amendment may be had, listed previously in the section. None of the cases construing the section appear to have imposed any such limitation upon the scope of the clause. See also *Milwaukee Sanitarium v. Swift*, discussed *supra*, note 103, where under this clause of section 180.07(1), amendment authorizing issue of stock in disregard of pre-emptive rights was upheld.

not let in amendments providing for consolidation or merger under a subsequent statute authorizing them.¹⁰⁷

Limitations of space prevent detailed consideration of very many proposed or recently enacted amendments to the corporation statutes. Cumulative voting has been suggested as a desirable subject for legislation.¹⁰⁸ Its practical effect is to give minority stockholder groups a relatively larger voting power. It is not mentioned in Wisconsin statutes, but it could conceivably be argued that it is eligible for inclusion in original articles by virtue of the clause in Section 182.15¹⁰⁹ which precedes the provision entitling every shareholder to "one vote for each share of stock held and owned by him at every meeting", namely: unless "a provision to the contrary is inserted in the articles". However, the Attorney General has ruled that provisions for cumulative voting cannot be validly inserted in the original articles, and this view is supported by opinion from other general quarters.¹¹⁰ It appears likely that cumulative voting stands on much the same footing as consolidation.

As was pointed out with reference to the *Bradley Knitting Company* case,¹¹¹ a broad power of amendment with reference to preferred stock, and its dividend, voting, and preference rights stems from Section 182.13. No doubt, much new legislation as to such matters

¹⁰⁷ Most modern corporation acts contain sections giving dissenting stockholders an election to obtain payment for their shares under an appraisal procedure provided by statute, in the event at least of such consequential majority action as consolidation or merger, sale of all the assets for stock in another corporation, etc. See Illinois Rev. Stat. (State Bar Asso. ed. 1945), Ch. 32, secs. 157.70, 157.73. Such statutes have been held valid against dissenters who acquired their stock before their passage, by courts following the majority view, and the presence of the appraisal remedy has without question moved the courts to give the consolidation and other statutes favorable consideration. Curran, "Minority Stockholders and the Amendment of Corporate Charters," 32 Mich. L. Rev. 743 at 758-764 (1934); Lattin, "Remedies of Dissenting Shareholders under Appraisal Statutes," 45 Harv. L. Rev. 233 (1931); Lattin, "A Reappraisal of Appraisal Statutes," 38 Mich. L. Rev. 1165 (1940); 15 Fletcher, *Cyclopedia Corporations*, rep. vol., sec. 7165 (1938). But even with the appraisal remedy included, the dissenter's original contract is changed. He is simply given an election, to have his stock replaced by stock in a new corporation, or to turn it in for cash on an appraisal basis. At best, something resembling dissolution as to him is forced upon him, but the dissolution analogy is not a complete one. Certainly this kind of dissolution was not part of his original contract. Thus, even with the appraisal procedure included in the new consolidation statute, courts following decisions announcing the doctrine of the *Marsh* case could not uphold it without overruling those decisions at least in effect. This was done in New Jersey: *Bingham v. Savings Investment & Trust Co.*, 101 N.J.Eq. 413, 138 A. 659 (1927), aff'd. 102 N.J.Eq. 302, 140 A. 321 (1928), and in an early case where no legislative power of amendment was reserved, *Lauman v. Lebanon Valley R.R.*, 30 Pa. 42, 72 Am. Dec. 685 (1858).

¹⁰⁸ Levin, "Blind Spots in the Present Wisconsin General Corporation Statutes," 1939 Wis. L. Rev. 173 at 193.

¹⁰⁹ Wis. Stat. (1943), sec. 182.15.

¹¹⁰ 18 Ops. Atty. Gen. (Wis., 1929), 429; 5 Fletcher, *Cyclopedia Corporations*, perm. ed., sec. 2048 (1931).

¹¹¹ *Supra*, note 99.

may well escape the issue of the *Marsh* case because it can be interpreted as not enlarging previous majority power, but a query is advanced concerning the effect of Chapter 467, Laws of Wisconsin (1945), amending Section 182.13(3), and giving second preferred stock a new right to vote as a class on any change in relation to preferred stock of either class, and denying to first preferred a vote with relation to certain named changes in the second preferred. This section easily could operate to place the first preferred in a less advantageous position in a particular situation than under the previous voting procedure. Such voting provisions no doubt were ineligible for inclusion in original articles before this section. Certainly they would conflict with the section as written before; "No change*** shall be made, except by amendment to the articles adopted by a vote of three-fourths of the preferred***". Query as to whether such procedure can now be enforced against the dissent of a first preferred stockholder under the *Marsh* decision.

It becomes clear that adherence to the doctrine of the *Marsh* case can have the effect of hamstringing the legislature to amendments of corporation statutes which do not enlarge majority power for corporate action. Such a prospect is alarming, to put the matter mildly. As the Court said in the *Bradley Knitting Company* case:¹¹²

"In this day and age of corporate activity, it would be a serious matter to hold that one per cent of the stockholders of a corporation could defeat the will of the other ninety-nine per cent."

Yet the doctrine of the *Marsh* case does call for such a holding. It is submitted that the natural growth of business law in a fluid society will not be halted by such a doctrine. That it has not been elsewhere is only evidence of the fundamental truth. To put the matter concretely, it cannot halt the legislative process, nor can it halt the matter from arising again and again for decision. Such a doctrine can only survive indefinitely in a purely static condition of economic affairs. Its existence finds ready explanation in the peculiar history surrounding the *Dartmouth College* case and the development of the reserved power, in cases where the problems of today were not before the courts. Paradoxically, the doctrine found expression in many decisions which in result actually extended the legislative police power. There is reason and more to overrule the case and clear the law of its lurking threat to natural corporate growth.

Nor can it be effectively argued that the alternatives to such a rule constitute any measurable threat to the safety of private investment, or open the door to majority abuse. In only one state

¹¹² *Supra*, note 99, at page 580.

have the logical implications of the majority view had results in judicial decision which give even half-hearted support to the alarmist. The doctrine of "vested rights" has proved generally adequate to control legislative abuse, and in spite of *Erie R.R. v. Tompkins*, there remains the Constitution and due process.

For these reasons it is submitted that the *Marsh* case should be overruled when and if the matter should arise for decision, in order to leave to the Wisconsin Legislature a power of change commensurate with that of legislatures in most other states. However, the case still is the law, and should be considered by those responsible for the drafting of new corporate legislation. It is suggested that such legislation, when drafted, might well be worded to include language preserving the validity of the legislation as to corporations formed subsequent to its effective date, in the event of a court decision declaring it unconstitutional upon the objection of stockholders in corporations existing prior to its effective date.¹¹³

¹¹³ See Model Business Corporation Act, Secs. 62 and 64, in 9 U.L.A. 152, 153 (1942).